No. 14527

United States
COURT OF APPEALS
for the Ninth Circuit

WIEL AND AMUNDSEN, A/S,
as claimant of the SS ROMULUS,
Appellant,

vs.

ROY E. POTTER,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court
For the District of Oregon.

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JURISDICTION

Jurisdiction of the District Court was based upon this being a suit in Admiralty. Title 28 U.S.C.A. § 1333.

Jurisdiction of this Court is based upon this being an appeal from the decree entered in that suit. Title 28 U.S.C.A. § 1291.

The pleadings will be found on pages 3 to 21 of the Transcript of Record.

STATEMENT OF THE CASE

Libelant Potter was a longshoreman employed by a contract stevedore, Independent Stevedoring Company, to load lumber cargo aboard the Norwegian ship ROMULUS at North Bend, Oregon. The ROMULUS was a small lumber carrier with a forepeak raised about seven feet above the main deck. The ship was equipped with a guard railing along the entire distance of the after end of the forepeak, except for a small opening amidship from which a ladder led from the forepeak to the main deck. Respondent's exhibit 9 (R. 46) shows the details of the guard railing, particularly on the port side. The section of the guard railing immediately adjacent to the midship ladder was constructed with movable rails to permit mooring lines to be brought down to the deck (R. 94). The midship end of this movable rail was constructed in the shape of a hook which was inserted into an eye built on the midship stanchion. When the hook was so placed through the eye, a lateral force would not dislodge the rail—it required a direct upward pull to remove the hook end from the eye (R. 107).

Lumber cargo had been partially loaded on the deck of the vessel at No. 1 hatch, the area immediately aft of the forepeak. Along the port side the lumber deck cargo was stored to a height of about six feet, except for a two or three foot strip running fore and aft, next to the hatch coaming where the lumber was stowed only three feet high (R. 92) (Ex. 9, R. 46).

On the morning of the accident involving libelant, Mr. Potter was working as acting hatch boss at No. 1 hatch. At about 8:30 a.m. he was standing on the deck cargo on the portside of No. 1 hatch while his immediate superior, the walking boss, Girt, was standing on the forepeak by the midship ladder. Apparently libelant wished to talk with the walking boss. Rather than climb over the guard railing to the forepeak and walk across the forepeak, or climb down from the deck cargo, cross the deck and ascend the ladder to the forepeak, libelant chose to sidestep along the after edge of the forepeak outside the guard rail, holding on to the top rail. There was no proof that this manner of using the guard rail was usual and normal, and witnesses who had worked aboard the vessel many times on earlier voyages into Coos Bay had never seen anyone so using this guard rail (R. 94, 95, 101, 105, 106).

While he was proceeding along toward the ladder and was almost to the ladder, libelant exerted a direct upward pull on the removable top rail pulling the hook out of the eye, which caused him to fall to the deck below. The manner in which libelant was seeking to move is clearly illustrated by libelant's exhibit No. 6-D printed on page 45 of the Record. This photograph was posed by the walking boss, Girt.

Libelant contended that all ship's equipment, when not in use, should be secured so that he could use the equipment in any manner he desired. Because this rail was not fastened into the eye by a cotter key, mousing or other device, he contended the vessel was unseaworthy and the owners negligent.

The case was tried before the Honorable Claude McColloch who rendered a decree in favor of libelant for $13,601.00.

It is from that decree that this appeal is taken. All of the facts essential to a determination of the issues of liability in this case are undisputed. Appellant is appealing from the conclusions drawn by the trial court that these facts established unseaworthiness and negligence. Such conclusions are fully reviewable by the Court of Appeals.

> Bonnewell v. United States (CCA 4, 1948), 170 F. (2d) 411, 412, 1948 A.M.C. 1954;
>
> Ellis v. American Hawaiian SS Co. (CCA 9, 1948), 165 F. (2d) 999, 1948 A.M.C. 707.

SPECIFICATION OF ERRORS

I.

Appellant contends that a ship is seaworthy when its equipment is sufficient and fit for the ordinary and usual circumstances to be anticipated by the owners or master of the ship. Because the guard rail was sufficient for its ordinary and usual uses, appellant contends the trial court erred in concluding from undisputed facts that the vessel was unseaworthy because the guard rail was not affixed permanently or secured with a cotter key or shaker or other device through the eye of the hook (R. 24, 26, 31, 32, Finding of Fact V, VI, VII, Conclusion of Law II, Assignment of Error I, II, III, V, VII).

II.

Appellant further contends that the owners were not negligent in maintaining the vessel because the guard rail was sufficient for its usual purpose, and that the unauthorized and improper use of the guard rail by libelant was not reasonably foreseeable by the owners. Thus appellant urges that the trial court erred in concluding otherwise (R. 24, 26, 31, 32, Finding of Fact V, VI, VII, Conclusion of Law II, Assignment of Error I, II, III, V, VII).

III.

Lastly, appellant contends that libelant was himself guilty of contributory negligence as a matter of law in deliberately choosing a potentially unsafe route when two clearly safe routes were available to him. Appellant assigns as error the trial court's ruling that libelant did not choose an unsafe way in which to perform his work and was not negligent (R. 25, 26, 31, 32, Finding of Fact XI, Conclusion of Law III, Assignment of Error IV, VI, VII).

ARGUMENT

I.

The Romulus was Seaworthy in Respect to the Guard Rail at the After Edge of the Forepeak.

The duty to provide a seaworthy vessel is a duty to supply and keep in order the proper appliances appurtenant to the ship. THE OSCEOLA, 189 U.S. 159, 47

L. Ed. 760. It means that ordinary and usual circumstances must be anticipated by the owner or the master of the ship to provide the seaman or the employees with a vessel that is sufficient and fit to encounter the ordinary perils of the contemplated voyage. In short, it is the sufficiency of the vessel in materials, construction, function, equipment, officers, crew and outfit for the trade or service for which it is being employed. *McLeod v. Union Barge Line Co.* (D.C. Pa. 1951), 95 F. Supp. 366, aff. 189 F. (2d) 610.

Under the foregoing rule, the ROMULUS was seaworthy at the time of libelant's injury.

An examination of the photographic evidence, particularly those reproduced in the Record (pages 44, 45), shows the guard rail at the after end of the forepeak on the ROMULUS. It is obviously designed as a safety measure to keep men from falling from the forepeak to the main deck below. In this regard it amply fulfilled its function. The walking boss, libelant's immediate superior, clearly brought this out, and it was not in any manner disputed by libelant.

> "Q. . . . Could you tell the court from your experience what would be the purpose of this guard railing?
>
> A. It was for the purpose of protecting the men from falling off the forecastle when they were working there—I should say, sailors working there at sea; also when a man was walking along the forecastle, a longshoreman or sailor, to keep him from falling off the forecastle onto the main deck, in case they would fall sideways.
>
> Q. I think I am right when I say you testified the railing would serve that purpose.
>
> A. Yes." (R. 112)

As pointed out in the Statement of the Case, above, this guard rail was removable so that mooring lines could be brought down to the No. 1 winches.

> "Well, it was built that way for the mooring lines, in case of an emergency, to use the No. 1 winches. It was built that way by the original builder." (R. 105) (see also R. 94)

But, despite the fact that the guard rail was removable, it nevertheless was a safe and proper appliance under the seaworthiness rule. Bearing in mind that its purpose was to protect men from falling from the forepeak to the deck, it was so constructed that a lateral force (the force which would be expected from a person on the forepeak) would not dislodge the rail. Only a direct upward pull would remove the hook end of the rail from the eye. This was not contradicted in the evidence.

> "Q. After the accident did you go up on the forepeak and make a check as to what force it would take to pull that railing out of the eye? Did you or did you not?
>
> A. Yes.
>
> Q. Will you explain to the court what you found.
>
> A. Well, I found that it had to be pulled straight out.
>
> Q. Before the railing would come out?
>
> A. Yes.
>
> Q. What was the effect of a lateral force against the railing?
>
> A. Well, it would stay.
>
> Q. The railing would stay in place with a lateral force exerted?
>
> A. Yes." (R. 106, 107)

No person standing on the forepeak, forward of the rail, could dislodge the rail without standing next to it

and pulling straight up. Certainly such a rail was seaworthy under all ordinary and usual circumstances.

Libelant relied in the trial court upon the fact that the hook end, after it had passed through the eye, was not secured by a cotter key, or shaker, or other device, and urged that such absence rendered the rail unseaworthy. However, the undisputed evidence in this case is that the guard rail—without the cotter key or other device—was adequate, sufficient and fit for its acknowledged purpose. Because of this, the presence or absence of the cotter key or other device is without significance.

Such a contention, as libelant makes, implies that seaworthiness means that the vessel's appurtenances must be sufficient and fit to meet *any demand* which libelant might make upon them, without regard to the ordinary and usual circumstances of use. To analyze libelant's argument further—apparently if he chose to secure the guy wires from a heavy lift boom to this guard rail or one of its stanchions, and the rail or stanchion carried away under a heavy load, he would then contend that the rail or stanchion was unseaworthy. This clearly is beyond any rule of seaworthiness.

It was only because libelant adopted a dangerous and unprecedented method of using this guard rail that he was injured.

In similar cases it has been held that there is neither unseaworthiness nor negligence. In *Holub v. Sword S.S. Line, Inc.* (CCA 5, 1942), 132 F. (2d) 206, libelant was climbing about in the hold of the ship, using cargo

cleats rather than ladders. He fell when one of the cleats broke. The Court held in favor of the ship, saying at page 207:

> "The cleats were placed and maintained in the ship solely to hold the cargo battens in place and not for use by appellant or others in climbing about inspecting the ship. Appellee owed appellant no duty to maintain them so that appellant could safely use them to climb upon, and the ship was not rendered unseaworthy because of appellee's failure to do so, nor was such failure negligence unless appellee knew or, under the facts, should have known, or was charged with notice that appellant intended to or would so use them. The Queen Elizabeth, 209 F. 712, Consolidation Coastwise Co. v. Connelly, 250 F. 679, 680, New Orleans Coal & Bisso Towboat Co. v. U. S., 86 F. (2d) 53, Smith v. U. S., 96 F. (2d) 976."

And in *Christiansen v. United States* (D.C. Mass. 1951), 94 F. Supp. 934, a ship cleaner fell when a sweatboard upon which he was climbing broke. There the Court said:

> "From all of the evidence submitted I find that there was neither neglect on the part of the boat owner or his employees nor unseaworthiness when understood as liability without fault. The sweatboard made of dunnage was put there for but one purpose—protection of cargo—and never intended to be used as a ladder. Recovery in this case is not being denied on any theory of assumption of the risk. *It is directed to the proposition that an instrumentality properly used aboard the vessel for one purpose cannot be changed into a dangerous instrumentality by reason of the adoption of the custom of carelessness or neglect on the part of those who use the instrumentality.* There is no unseaworthiness in this case." (Italics added)

In *Sulsenti v. Cadogan S.S. Co. Ltd.* (S.D. N.Y. 1943), 54 F. Supp. 570, the libelant, a longshoreman, fell, alleging that a cargo batten broke. The Court stated:

> "Even assuming that the accident occurred in the way that libelant now says it did, I still do not think that there can be any recovery against the Steamship Company. Cargo battens are not intended to be used as ladders. The Queen Elizabeth, 209 F. 712, Aurigemma v. Nippon Yusen Kaisha Co., 238 N.Y. 183, 144 N.E. 495."

The instant case clearly falls within the rule of the cases cited above. The guard rail was properly used aboard the ROMULUS for the purpose of protecting men working in the forepeak from falling onto the deck. It was not intended as a walkway or to be used by men hanging precariously onto the after end and sliding along as the libelant was doing. The adoption of a dangerous method for libelant to perform his work does not turn a proper instrumentality into an unseaworthy one nor does it render the owner liable for negligence. As will be commented upon later, there is no proof in this case that the vessel or its owners knew or should have known that the libelant or any other longshoreman was intending to use the guard rail in the manner in which he did.

The leading case of *Seas Shipping Co. v. Sieracki,* 1946, 328 U.S. 85, 90 L. Ed. 1099, and the more recent case of *Petersen v. Alaska Steamship Company, Inc.* (CA 9, 1953), 205 F. (2d) 478, both involved injury to longshoremen caused by defective appurtenances which broke while being properly used by longshoremen. Nowhere have we found any case extending the doctrine

of seaworthiness to a condition which is adequate and safe for all uses and purposes intended but because of misuse by a longshoreman an injury results.

Appellant therefore contends that the trial court erred in concluding that the guard rail on the ROMULUS was unseaworthy at the time of libelant's injury.

II.

The Owners of the Romulus were not Negligent In Failing to Affix Permanently or Secure the Guard Rail With a Cotter Key or Other Device.

Under the undisputed facts in this case the questions of unseaworthiness of the rail and negligence of the owners in maintaining the rail as it was at the time of libelant's injury are practically identical. For that reason the discussion hereinabove on unseaworthiness is equally applicable to the claim of negligence on the part of the owner.

In *Holub v. Sword S.S. Line Inc.,* supra, and *Christiansen v. U. S.,* supra, the opinions disposed of unseaworthiness and negligence at the same time and in the same manner, absolving the vessel and its owner from liability.

The libelant did not deny that the rail was for the purpose of protecting the men from falling off the forecastle when they were working there. Nor did he deny that the guard railing would serve that purpose. Where the rail was thus adequate and proper for the uses and purposes for which it was intended, the owner was not negligent in maintaining it in that condition.

III.

The Maintenance of the Guard Rail in the Condition it was at the Time of Libelant's Injury was not Negligent Because the Danger of Injury in the Manner Sustained by the Libelant was Not Reasonably Foreseeable.

It is fundamental in negligence cases that the court must conclude as a matter of law that the injury ought to have been foreseen in the light of attending circumstances before a conclusion of negligence can be made.

Pittsburgh S.S. Co. v. Palo, (CCA 6, 1933), 64 F. (2d) 198, 200:

> ". . . . . In neither were facts shown which should lead the defendant to anticipate the danger of injury to its seamen by virtue of the existing condition of the ship's appliances. Whether or not the fact that injury of some sort might reasonably have been foreseen bears a proper part in the application of the doctrine of proximate cause (see Johnson v. Kosmos Portland Cement Co. (C.C.A.), 64 F. (2d) 193, and Smith v. Lampe (C.C.A.), 64 F. (2d) 201, decided at this session), it is now firmly established that no act or omission may be considered negligent, unless the danger of injury was reasonably foreseeable. In Lincoln Gas & Electric Co. v. Thomas, 74 Neb. 257, 260, 104 N.W. 153, 154, the court thus expressed the same thought: 'It is of the essence of actionable negligence that the party charged should have knowledge that the act complained of was such an act of omission or commission as might, within the domain of probability, cause some such an injury as that complained of.' In Hope v. Fall Brook Coal Co., 3 App. Div. 70, 75, 38 N.Y.S. 1040, 1043, the court says: 'The circumstances necessary to

be known before the liability for the consequence of an act or omission will be imposed must be such as would lead a prudent man to apprehend danger.' See, also, Burton v. Greig, supra; Waters-Pierce Oil Co., v. Van Elderen, 137 F. 557 (C.C.A. 8); Carey v. Baxter, 201 Mass. 522, 525, 87 N.E. 901; Stedman v. O'Neil, 82 Conn. 199, 72 A. 923, 22 L.R.A. (N.S.) 1229; Wickert v. Wisconsin Central R. Co., 142 Wis. 375, 125 N.W. 943, 20 Ann. Cas. 452. In view of these decisions, and many others, it is not sufficient to show simply that a defect existed; the defect must be of such nature that the defendant should reasonably have apprehended the danger of injury."

See also:

Calmar Steamship Co. v. Taylor, 99 F. (2d) 84 (CCA 3, 1937), (Reversed on other grounds, 303 U.S. 525, 82 L. Ed. 993).
Milwaukee etc. Railway Co. v. Kellogg, 94 U.S. 469, 475, 24 L. Ed. 256.

Libelant has failed completely in this fundamental aspect of his case. There were no facts shown which should lead appellant to anticipate the danger of injury to workmen aboard the ROMULUS by virtue of the construction of the guard rail, or the absence or presence of a cotter key or other securing device.

The rail had never been used in the manner used by libelant. Mr. Harold, the supercargo who had worked aboard the ROMULUS for 17 or 18 times, stated that he had never seen anyone walking along the after edge of the railing as Mr. Potter did when he was injured (R. 94, 95). The walking boss who had worked aboard the vessel as longshoreman and walking boss on 14 or

15 different voyages of the vessel into Coos Bay (R. 101) stated that to the best of his recollection he had never seen any longshoremen walk along the after edge of the forepeak (R. 105, 106).

There is no evidence of any custom of longshoremen walking along the after edge of the forepeak in the manner used by Mr. Potter. There is no evidence that this rail or any other rail along the after edge of a forepeak had ever been used by any longshoreman on any vessel in the manner in which Mr. Potter was attempting to use the one on the ROMULUS.

In view of this undisputed evidence it is perfectly clear that under all of the circumstances the shipowner could not have reasonably anticipated Mr. Potter's manner of using the rail and his possibility of being injured thereby. There is absolutely no evidence that the shipowner knew or should have known of the possibility that any workman aboard the ROMULUS would hang on the outer edge of the forepeak rail and exert a direct upward pull of sufficient force to dislodge the hook of the rail from the eye on the stanchion.

Because of this, appellant contends the trial court erred in concluding the shipowner was negligent.

IV.

Libelant Himself was Guilty of Contributory Negligence as a Matter of Law in Deliberately Choosing a Potentially Unsafe Route When Two Safe Routes were Available to Him.

From Mr. Potter's position on the deckload near No. 1 hatch there were two methods he could have used to get to the position of the walking boss on the forepeak, other than the route which he did take. This is set out clearly in the testimony of Mr. Harold beginning at page 95 of the Record:

> "Q. From the place where Mr. Potter was standing, that is, on the forward part, on top of the deckload, what was a route he could have taken to get up on the forepeak, just in front of the emergency ladder on the forepeak?
>
> A. Well, he could have stepped down onto the wharfway and walked up the ladder.
>
> Q. Walked across the main deck and up the ladder?
>
> A. Yes.
>
> Q. What was another route he could have taken?
>
> A. Well, he could have walked from where he stepped over the rail directly ahead."

Instead Mr. Potter chose the more patently dangerous route of sliding along the after edge of the forepeak, holding onto the rail. Immediately after the accident he recognized his own carelessness when he made the statement "Maybe it will knock some sense into my head" (R. 79).

Despite this uncontradicted testimony the trial court held as a matter of fact that the libelant did not

choose an unsafe way in which to perform his work, was not negligent and concluded as a matter of law that libelant was not himself contributorily negligent (R. 25, 26).

In *Bohannon v. United States,* 92 F. Supp. 700 (D.C. S.D. N.Y., 1950), aff. 185 F. (2d) 678, the court considered a similar situation. A seaman was ordered to a particular part of a ship and there were three routes by which he could get there, one absolutely safe, another which was reasonably safe and a third which was very hazardous. The seaman took the most hazardous and was injured.

> "The whole charge of negligence is based on the false assumption that there was no safe route to the forepeak at the time, because of the sea. The fact is that there was an absolutely safe way across the catwalk from the midship house to the forepeak; and there was a reasonably safe way by using the catwalk half way and the well deck for the latter half of the distance to the forepeak. There was no negligence on the part of any of the officers or crew. The tanker was seaworthy. Bohannon's accident was due solely to his own recklessness. The cause of action based on negligence is without merit.
>
> ". . . . .
>
> "The following quotation from Holm v. Cities Service Transp. Co., 2 Cir., 60 F. (2d) 721 at p. 722 is applicable: 'Where the conduct of the injured seaman, however, is induced only by his own free will, and he acts to his injury at a time and place when he is free to choose between doing what is safe and what is known to him to be dangerous, he is obviously under no more compulsion than is an employee on land.'
>
> "In Johnson v. United States, 74 F. (2d) 703, 704, which is very similar to the facts in the case

> at bar, the Circuit Court of Appeals, Second Circuit, stated: ' A seaman to whom two ways were available, one dangerous and the other safe, assumed whatever risk was involved in taking the dangerous course when he selected it through his personal choice and not because of any compulsion or ignorance of the situation.' " 92 F. Supp. 700, 703.

See also, *Tampa Interocean S. S. Co. v. Jorgensen* (CCA 5, 1938), 93 F. (2d) 927.

There is no dispute in the evidence that there were two safe routes available to Mr. Potter and that he deliberately chose a potentially dangerous route. Under the above authorities, appellant contends that libelant's deliberate choice of a hazardous route was the cause of his injury and that he should be charged with contributory negligence as a matter of law.

CONCLUSION

Appellant respectfully contends that the decree of the trial court should be reversed upon the grounds that the undisputed evidence showed a guard rail which was adequate, safe, seaworthy and proper for all the uses and purposes for which it was intended, that libelant's method of using the rail was unforeseen and without precedent, and that libelant himself caused his injury by unnecessarily choosing a hazardous route when two safe routes were open and obvious to him.

Respectfully submitted,

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